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No. 99-1069

In the
Supreme Court of the United States

THE MONTGOMERY COUNTY PUBLIC SCHOOLS AND MEMBERS OF MONTGOMERY COUNTY BOARD OF EDUCATION, et al., *Petitioners*,
v.
JEFFREY EISENBERG AND ELINOR MERBERG, ON BEHALF OF JACOB EISENBERG, et al., *Respondents*.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION and American Association of School Administrators, Association of Multi-Ethnic Americans, California School Boards Association, Center for the Study of Bi-Racial Children, the Council of the Great City Schools, Georgia School Boards Association, Horace Mann League, Illinois Association of School Boards, Magnet Schools of America, Maryland Association of Boards of Education, National Alliance of Black School Educators, National Association for Multicultural Education, National Association of Secondary School Principals, North Carolina School Boards Association, Texas Association of School Boards and Washington State School Directors' Association

IN SUPPORT OF PETITIONERS

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This brief is filed with the consent of both parties. Letters of consent are on file with the Clerk of this Court.[1]

INTEREST OF *AMICI*

The National School Boards Association (NSBA) is a nonprofit federation that represents the nation's 95,000 school board members, who in turn serve more than 90 percent of the K-12 students in the nation. NSBA's dedication to the principles of diversity is outlined in its Beliefs and Policies:

> "The United States is a complex, racially diverse society. School boards should take positive action to support integration, provide equality of educational opportunities, and eliminate from educational materials and from district procedures stereotyping of women, minorities, immigrants and migrants. The total school environment, including its curriculum, should reflect the multicultural nature of the world." (Article II, Belief 3.3 Quality Integrated Education)

NSBA has had a long interest in the effective development and implementation of local school board policies including those that set student enrollment standards and procedures in order to promote educational objectives.

The California School Boards Association is a nonprofit association that represents 1,000 public school districts governing boards and county boards of education in the state of California. The Georgia School Boards Association is a nonprofit association that represents the 180 boards of education in the state of Georgia. The Illinois Association of School Boards is a nonprofit association that represents 864 public school boards of education in the state of Illinois. The Maryland Association of Boards of Education is a nonprofit organization that represents all of the state's 24 local boards of education and the Maryland State Board of Education. The North Carolina School Boards Association is a

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[1] This brief was written by the National School Boards Association, who is leading *amici curiae* before this Court, and not in any part by counsel for either party. No person or entity other than NSBA has made a monetary contribution to the preparation or submission of this brief.

nonprofit organization that represents the 117 local school boards in the state of North Carolina. The Texas Association of School Boards is a nonprofit association that represents 1,047 public school boards in the state of Texas.

The American Association of School Administrators is a nonprofit professional organization representing over 15,000 educational executives. Its interest in this case stems from its longstanding commitment to diversity. AASA believes that the interests of children are best served when segregation of social, economic, ethnic and racial populations in schools is diminished.

The Association of Multi-Ethnic Americans is a nationwide, nonprofit confederation of local multiethnic, interracial groups. It was founded in 1988 with the primary goal of promoting positive awareness of interracial and multi-ethnic identity.

The Center for the Study of Biracial Children advocates for the rights of interracial families, biracial children and multiracial people. The Center provides advocacy, training and consulting on behalf of this population, which has unique needs and challenges not addressed by society's institutions.

The Council of the Great City Schools is a coalition of 57 of the largest urban public school systems in the United States. The Council serves more than 6.6 million children in inner city schools around the nation, and about 80.7 percent of the student population are African American, Hispanic, Asian American and other minorities. The Council believes this case is important to the nation's urban schools so that they can remain empowered to reduce racial isolation and to value the richness of their culturally and linguistically diverse student population.

The Horace Mann League was founded by a group of leading educators in 1922. It exists to perpetuate the ideals of Horace Mann, the founder of the American public school system. According to the League's beliefs, our public schools should be free, classless, non-sectarian, and open to all of the children of all of the people. The League believes that the public school system of the United States is an indispensable agency for the perpetuation of the ideals of our democracy and a most necessary unifying and dynamic influence in American life.

Magnet Schools of America is a nonprofit educational organization formed to promote equity, excellence, innovation and

the reduction of minority isolation. MSA's interest is on behalf of the more than 4,200 magnet schools throughout the United States and approximately 1.5 million children attending these innovative and diverse public schools. Specifically, MSA strongly supports the federal grant program and the Magnet Schools Assistance Program, designed to support the desegregation of public schools by supporting the elimination, reduction, or prevention of minority group isolation in elementary and secondary public schools.

The National Alliance of Black School Educators is a nonprofit organization of 5,000 members, constituting the largest network of black educators in the nation. NABSE is dedicated to improving the educational accomplishments of African American youth through the development and deployment of instructional and motivational methods that increase levels of inspiration, attendance and overall achievement.

The National Association for Multicultural Education is the primary membership organization addressing issues of multicultural education throughout the United States. NAME was formed to bring people together from all levels of education, from organizations, businesses and communities, who are committed to achieving education that is multicultural and a society which is fair to all.

The National Association of Secondary School Principals serves more than 42,000 education leaders in middle level schools and high schools, including administrators, teachers, students and others interested in the education and welfare of today's youth.

Washington State School Directors' Association was formed to enhance the coordination of programs and procedures pertaining to policymaking and to the control and management among the school districts in the state. The Association represents all of Washington's 1,482 school board members governing the 296 public school districts in the state.

STATEMENT OF THE CASE

Montgomery County (Md.) Public Schools had a policy which denied students transfers if the transfer would compromise diversity or increase racial isolation in individual school buildings. Pursuant to this policy, Jacob Eisenberg, a white incoming first grader, was denied a transfer to a math-science magnet school. Eisenberg brought an action in federal district court seeking a

preliminary injunction against the policy. The district court ruled in favor of the school's policy. The Fourth Circuit Court of Appeals reversed, ruling in favor of Eisenberg and granting a final decision on the merits.

This case warrants Supreme Court review because it presents a critical legal issue: *Can a local school board take intentional steps to create a diverse learning environment?*

School districts need guidance about how race can be considered when assigning students in elementary and secondary schools. In constitutional law, our public school system is viewed as a unique legal context. Unlike any other setting, the mission of public schools involves not only academic proficiency but a demand that children be prepared to assume their social, civic, democratic and economic responsibilities. As such, this Court has often recognized that the public school context merits special consideration.

Montgomery County (Md.) Public Schools' transfer policy was voluntarily undertaken by a school district with no court-determined history of *de jure* segregation. Thus, this case presents the issue of race and K-12 student assignment without necessarily raising questions of remedial desegregation and court orders.

This Court's acceptance of review is urgent because of conflicts between the circuits and because of the on-going, educational upheaval created by this uncertainty. Faced with vastly conflicting court opinions, school officials are uncertain precisely how to meet the important educational goal of educating children in a diverse setting without violating the law.

SUMMARY OF THE ARGUMENT

Public school districts around the nation have been placed in a legally untenable position. The Fourth Circuit's decision is sure to have a chilling effect nationwide. School leaders need guidance on how they may use race, together with other factors, in granting or denying transfers, or devising overall student assignment plans, or admitting students to magnet schools or special academies.

A U.S. Supreme Court decision is needed to:

A. settle the conflict within and among federal circuit courts.

B. establish specific ground rules for considering race given the special context of student assignment in kindergarten through 12th-grade public schools.
C. reinforce educators' discretion to exercise sound judgments on how best to prepare students for economic success and daily living in the 21st Century.
D. affirm that locally accountable school board members can ratify policies and practices to accomplish the educational benefits of diverse learning environments.

Amici urge this Court to abide by the teachings of *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny. Now, even more than 45 years ago, we understand that "separate ... [is] inherently unequal." [2] In the U.S. today, it is not just that "separate is inherently unequal"; but separate is academically deficient.

ARGUMENT

I. A U.S. Supreme Court decision is needed to settle the conflict within and among circuits and to set a proper standard for evaluating these cases.[3]

Currently, race may or may not be a permissible factor in student assignments, depending on the jurisdiction. Consequently, school administrators and boards of education are essentially chilled from exercising their sound educational judgments on this subject. For each day that passes, a significant portion of the 47 million children in our public schools are deprived of important, first-hand lessons in diversity that would aid each personally and benefit the Nation as a whole.

Part of the confusion stems from the assertion that this issue has been settled by related cases. Those who attack diversity

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[2] *Brown v. Board of Education*, 347 U.S. 483, 495 (1954).

[3] Petitioners have aptly described that conflict in their brief. *Amici* incorporate by reference pages 14-22 of the Petition for a Writ of *Certiorari* filed with this Court ("Petition"), which sets forth the conflict among the circuits on this issue.

programs use *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (affirmative action in government contracting; *Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (affirmative action in government contracting); and *Hopwood v. State of Texas*, 78 F.3d 932, *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) (affirmative action in a post-graduate professional degree program) as precedent. The analogy fails, however, because K-12 public education is a unique setting. The precedent set in those cases does not transfer to the facts and circumstances of this case.

The first two cases involve affirmative action programs in government contracting, not K-12 education. The *Hopwood* decision struck down the use of race as an admission criterion for the University of Texas School of Law – a graduate school program.

The use of *Adarand* and *Croson* as precedent in K-12 student assignment cases is inappropriate for at least two reasons. First, both decisions occur in the context of affirmative action. The challenged practices in both cases involve the same approach: providing a special advantage for racial minorities in obtaining a government benefit (subcontracting opportunities) as a means of compensating for past discrimination.[4] By contrast, schools are seeking to diversify the classroom because of the inherent value of a diverse learning environment, rather than as a remedy for past injustices. As such, the goal is to provide educational benefits to all children, regardless of race. Ensuring a diverse learning community by considering race, among other factors, is simply one educational tool that school boards and administrators employ to provide a well-rounded education. Second, the line of cases developed in the context of government hiring practices is not applicable to the K-12 context (*See infra*, part II). Given the

[4]In both cases Justices were concerned about conditioning a government benefit on racial classifications. With school diversity, there is no mechanical or systemic access to or denial of a benefit based on race. Children of all races will receive a free appropriate public education. The only issues in a case such as this is where the benefit will be provided. Given these stark differences, it is questionable whether *Adarand* and *Croson* apply and even whether strict scrutiny should be invoked.

significant differences between public elementary and secondary education and *Adarand* and *Croson*, the holding and reasoning in those cases are not dispositive of issues raised here.

Hopwood is a higher education case – again, a decidedly different context than K-12 education. In *Hopwood*, admission to a prestigious law school is at stake. The university's stated aim was to increase the number of minority law students through an affirmative action program that granted preference to minority candidates. By contrast, Montgomery County's program is motivated by the educational benefit of diversity and the harms of racial isolation,[5] and does not prioritize benefits based on race. In this situation, the student was already admitted to the public schools;[6] the school system's decision as to which school he should attend was part of an overall strategy to prepare every student for life's opportunities and challenges by ensuring diversity and guarding against racial isolation.

School systems, trying in good faith to abide by current law, are met with a tangled web of contradictory rulings.[7] A

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[5] Indeed, voluntary programs such as the one in Montgomery County Maryland are aligned with federal priorities expressed in the Magnet Schools Assistance Act, 20 U.S.C. § 7201. "[I]t is in the best interest of the Federal Government to ... continue the Federal Government's support of school districts implementing court-ordered desegregation plans and school districts *voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds*, beginning at the earliest stage of such students' education." (emphasis added).

[6] While admission to a particular law school might be viewed as a once-in-a-lifetime opportunity, the student in Montgomery County Maryland is already admitted to the system and benefits from the high quality curriculum offered at his assigned school. He also benefits generally from being privy to overall district offerings – a district that maintains one of the highest per pupil expenditures in the nation. Here, Jacob Eisenberg is merely requesting access to the educational benefits at a particular location. Setting attendance area boundaries and similar assignment policies are decisions traditionally reserved for school board authority and responsibility.

[7] Ironically, the only uniformity among the race and student assignment cases is the refusal to apply the full constitutional analysis, even while

conscientious school district, therefore, is left subject to attack from both sides. Having to defend a sound policy against legal challenges, simply because the law is unclear, results in diversion of public money from educational purposes to litigation expenses.

II. A U.S. Supreme Court decision is needed to establish specific ground rules for considering race in the special context of student assignment in K-12 schools.

This Court and other federal courts have long recognized the special context that exists within public schools and the associated need for a different civil rights framework within the K-12 setting.[8] Special constitutional rules have been applied in the public K-12 setting under the First Amendment,[9] the Fourth

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courts invoke strict scrutiny as the proper lens. Assuming, *arguendo*, that strict scrutiny should apply in this circumstance, the two-part analysis requires courts to determine whether the public school district has a compelling state interest for initiating and continuing a program that considers race and whether the approach is narrowly tailored to achieve that interest. Courts have refrained from conclusions about whether the use of race is a compelling state interest – citing the lack of U.S. Supreme Court guidance – but have nonetheless gone on to strike down programs for not being narrowly tailored enough, regardless of how that interest is defined or explained.

[8] *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission,'" even though the government could not censor similar speech outside the school); *see also Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969); *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 868 (1982) ("Of course all First Amendment rights accorded to students must be construed "in light of the special characteristics of the school environment.").

[9] In *Tinker*, 393 U.S. at 506 (1969), the Court focused on the need for balancing between free speech rights available generally in society and the special K-12 context: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.... Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the

Amendment,[10] the Fifth Amendment,[11] the Eighth Amendment,[12] and the Thirteenth Amendment.[13]

As stated by this Court, an education "is required in the performance of our most basic public responsibilities. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values." *Brown*, 347 U.S. at 493. It is an accepted role of the public schools to prepare America's children to participate in our democracy. This Court should consider the need for using race to protect diversity in light of public schools' unique mission of preparing students for effective citizenship in the future.

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school authorities." *See also, Bethel School District No. 403*, 478 U.S. at 682 (finding that vulgarity is not protected in the K-12 classroom, the Court declared that the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings"); and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (finding that, in light of the special context and pedagogical concerns of the school environment, school administrators have greater latitude than government generally to curtail the First Amendment free press rights of K-12 student newspapers).

[10] *E.g., New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) ("It is evident that the school setting requires some easing of the [Fourth Amendment] restrictions to which searches by public authorities are ordinarily subject.") .

[11] *See Goss v. Lopez*, 419 U.S. 565 (1975) (applying the due process clause); *Bills v. Homer Consolidated Sch. Dist. No. 33-C*, 967 F.Supp. 1063 (N.D. Ill. 1997) (applying the self-incrimination clause).

[12] *Ingraham v. Wright*, 430 U.S. 651 (1977) (refusing to apply the Eighth Amendment prohibition against cruel and unusual punishment to corporal punishment in the K-12 setting).

[13] *Herndon v. Chapel Hill-Carboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996) (rebuffing a claim that a high school graduation requirement for students to perform fifty hours of community service violates the Thirteenth Amendment ban on involuntary servitude). *See also United States v. Kozminski*, 487 U.S. 931 (1988); and *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 998, 1000 (3d Cir.), *cert. denied*, 510 U.S. 824 (1993).

While the Court has voiced misgivings about allowing the government to weigh race in other settings, the special context of K-12 public education raises issues that warrant review by this Court. Constitutional rules do not exist in a vacuum. Rather, the need for enforcement of individual rights is balanced against the asserted state interest. This Court, in its analysis, should consider the unique mission of public schools. In this instance, a careful analysis would conclude that the protection of a racially diverse learning environment and avoidance of the harms of racial isolation are so essential to the successful academic education of all children that leaders may take intentional steps to achieve both goals.

It is appropriate, then for this Court to have a different standard in judging the use of race in student assignment. If educators are forbidden to take intentional steps, it is likely that the educational deficits of racial isolation or resegregation will occur in quick fashion. [14]

III. A U.S. Supreme Court decision is needed to reinforce educators' discretion to establish sound policy.

Board members are the locally, democratically elected decisionmakers in local school districts.[15] The approximately 95,000 local school board members nationwide have been selected to make educational policy decisions that they as community

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[14] A good example of what happens when school officials exclude diversity or racial isolation from deliberations is Lowell High School, a coveted magnet school in San Francisco, California. Under the new admissions policy – which may take special account of the applicant's economic background but not his or her race – the number of African-American eighth graders accepted dropped from 5.6 percent to 2 percent; and the percentage of Latino students fell from 11.4 percent to 5.4 percent. Peter Schrag, *The Diversity Defense*, THE AMERICAN PROSPECT, September 1, 1999 at 57.

[15] Note that in some jurisdictions school board members are appointed; commonly though, even those appointments are made by democratically elected political officials.

representatives believe will best serve the children entrusted to their care.[16]

Courts intercede in academic policymaking only when there is a clear constitutional need. This judicial deference has been repeatedly set forth by this Court:

- "In this case, the Court must determine whether the Establishment Clause was violated in the special context of the public elementary and secondary school system. States and local school boards are generally afforded considerable discretion in operating public schools." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (BRENNAN, J., concurring in judgment).
- "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).
- "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." *Goss v. Lopez*, 419 U.S. 565, 578 (1975).

  "This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." See, e.g. *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 208 (1982); *Wood v. Strickland*, 420 U.S. 308, 326 (1975).
- "Except as last-resort refuges for the protection of constitutional rights, courts should not attempt to function as super school boards..." *Richmond Welfare Rights Organization v. Snodgrass*, 525 F.2d 197, 207 (9th Cir. 1975),

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[16] Policy decisions are based on educational judgments about what children need to succeed academically, economically, socially and as citizens.

citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1.

- "To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not" *School Dist. of Abington Township. v. Schempp*, 374 U.S. 203, 300 (1983), (BRENNAN, J., concurring in judgment), quoting in part, *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 237 (1948).

The public school curriculum goes beyond merely the traditional academic goals of reading, writing, and arithmetic.[17] Our communities depend upon the leaders of K-12 to do much more to fully accomplish their mission.[18] A complete education is holistic, addressing the child's development in areas of social skills, workplace skills, and critical thinking, nurturing a youngster's ability to grow in all respects.

To respond to changing times and the changing demands of success, schools have adapted their methodologies and content over the years. What might have seemed radical at its inception

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[17] "The quality of education is reflected not only in the subjects taught and achievement levels reached but also in the learning environment of schools. ... A school's learning environment is enhanced by ... diversity in the backgrounds of the student body." U.S. Department of Education, National Center for Education Statistics, *The Condition of Education 1998* at 130.

[18] Disdaining a comparison to *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 912 (1978), the district court below in *Eisenberg* wrote that, " ...it must be remembered that *Bakke* dealt with admissions to medical school. The present case deals with transfers between first grade classes. It is obviously unlikely that first graders will have extensive resumes which may be weighed and considered in addition to their race in the District's formulation of how to craft diverse classrooms. Notwithstanding the lack of classroom experience and other distinguishing credentials of these students, however, the need for a diverse classroom is equal, if not greater, than in later years." *Eisenberg v. Montgomery County Public Schools*, No. AW 98-2797 (S.D. Md. 1998) Petition for a Writ of *Certiorari* at Appendix 29a.

(physical education, art, music, sex education, breakfast or after-school programs) has gradually become part of the norm as local educators in each district recognize the wisdom of incorporating these elements into their educational program as the minimum necessary to prepare students for the future.

Census data confirm that the fabric of the U.S. population in this century will be woven from racially diverse strands. For example, the student-aged Latino population has grown rapidly in the last 30 years, increasing by 218 percent from 1968 until today. Projections show that by 2050, more than one quarter of all school-aged children will be the children of immigrants. The Caucasian population will drop from 73 percent in 1997 to approximately 53 percent in 2050.[19] Diversity is reflected in all kinds of communities in this nation. It is especially present in urban settings, where the 100 largest school districts teach 38 percent of the 17.6 million minority public school students.[20] However, diversity in our population is not limited to our urban centers. In Fargo, North Dakota, one-third of the students at Madison Elementary School were enrolled in English as a Second Language classes in the 1998-99 school year. In a school with 265 students, more than a dozen different languages were spoken.[21]

Clearly, we are becoming an increasingly diverse society. Our public schools recognize this and are adapting their academic and policy decisions accordingly.[22] To do otherwise would be

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[19] U.S. Census Bureau, *Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050, reprinted in* U.S. Department of Commerce, Minority Business Development Agency, "The Emerging Minority Marketplace" (1999).

[20] Beth A. Young, U.S. Department of Education, *Characteristics of the 100 Largest Public Elementary and Secondary School Districts in the United States: 1997-98*, EDUCATION STATISTICS QUARTERLY, Fall 1999, *available at* http://nces.ed.gov/pubs99/quarterlyfall99/3-Elem/3-esq13-c.html.

[21] U.S. Department of Education Secretary Richard Riley on the occasion of the 45th Anniversary of *Brown v. Board of Education*, May 17, 1999.

[22] In addition to the single-race children traditionally referred to and counted by the government, there are an increasing number of children of

shirking their responsibility and failing in their mission to prepare children for the future. "School authorities have wide discretion in formulating school policy. ... As a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." *Swann*, 402 U.S. at 17.

IV. A U.S. Supreme Court decision is needed to affirm that local school boards can enact policies to ensure the educational benefits of diverse learning environments.

The Court has an important opportunity in this case to recognize local school board discretion to seek student diversity and to avoid racial isolation as part of overall educational goals. The underpinning of a diversity approach is educational, wherein officials purposefully seek to achieve the many practical benefits gained by a diverse environment.

The Fourth Circuit gave no attention whatsoever to the positive attributes of diversity, the views of local educators or diversity as a positive academic strategy. The educational need for diversity springs from a different genesis than traditional desegregation activities or those steps designed to avoid the historic harms of racial isolation. Diversity as an educational strategy in the school setting yields benefits for all children.

Providing a diverse educational program results in no loss of opportunity as characterized by the Fourth Circuit Court of Appeals below.[23] In fact, neither Jacob Eisenberg, nor any other student, has an unfettered right to any specific educational program offered by public schools. The board of education has the authority to establish policies governing curriculum, programs offered, location, and enrollment. The Fourth Circuit's decision

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dual or multiracial heritage due to a rise in interracial couples. Recognizing this population shift, the 2000 Census will, for the first time in collecting racial statistics, permit individuals to choose all racial categories that apply.

[23] "The facts also appear all too familiar – a child has been denied access to a state-funded educational opportunity because of the color of his skin." *Montgomery County Public Schools v. Eisenberg*, 197 F.3d 123 (4th Cir. 1999). (*See* Petition for a Writ of *Certiorari* at Appendix 9a).

focuses primarily on the school district's refusal to accommodate a personal preference. If equivalent academic opportunities exist – which they do in both buildings (see Petition at 9, n.18) – then the board is simply establishing conditions for one educational program (diversity) based upon its educational vision.

Educators who conclude that learning in a diverse academic environment prepares our children for their future are not engaged in "social engineering", but are acting on the basis of sound educational research[24] – and their conclusion that positive academic results will occur.

1. Increases Academic Achievement

Diversity spurs academic achievement for all students.[25] Among the positive educational benefits of diversity is an increase in college graduation, income, and employment patterns for minority children.[26] Studies have found, *inter alia*, that students

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[24] "... there is substantial empirical evidence that racial diversity in elementary/secondary schools advances important policy goals – by increasing racial tolerance, breaking down barriers to minority achievement, and improving educational outcomes for all students." National Education Association, *The Benefits of A Racially-Diverse Student Body In Elementary/Secondary Education*, (1999), available at http://www.nea.org/publiced/racially.html.

[25] "It is important to note that, in addition to positive effects on intergroup relations, cooperative-learning methods have had positive effects on students of different ethnicities and backgrounds." Robert E. Slavin, *Cooperative Learning and Intergroup Relations*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION, 628, 632 (James A. Banks, ed. 1995).

[26] Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, HANDBOOK ON RESEARCH ON MULTICULTURAL EDUCATION (James A. Banks, ed., 1995); *see also* Robert L. Crain and Rita E. Mahard, *Minority Achievement: Policy Implications of Research*, EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY AND FEASIBILITY (Willis D. Hawley, ed., 1981).

who were educated in a diverse learning environment were more likely to attend and graduate from college and to work in professional positions than students who were not.[27]

2. Improves Future Workforce

Diversity also serves the interests of employers.[28] Research indicates that students who had a diverse school experience are better prepared for public service occupations such as teaching and police work, where they are called on to serve a diverse citizenry. Business executives have also found that integrated workplaces are often more productive, enhance organizational flexibility and lead to an expansion of markets.[29]

Research also has shown that a diverse educational environment provides long-term career advantages. For example, it leads to reduced racial stereotyping, diminished fears of hostile

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[27] James M. McPartland and Jomills H. Braddock II, *Going to College and Getting a Good Job: The Impact of Desegregation*, EFFECTIVE SCHOOL DESEGREGATION (Willis D. Hawley, ed., 1981). *See also* Robert L. Crain and Jack Strauss, DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENTS: RESULTS FROM A LONG-TERM EXPERIMENT, (1985); and *The Role of Social Science in School Desegregation Efforts: The St. Louis Example*, 66 JOURNAL OF NEGRO EDUCATION 195 (1997).

[28] "Diverse teams that actually utilized the variety of perspectives present outperformed the homogeneous teams... Thus the major implication for managers from the current study is that whereas increasing diversity in work teams is inevitable due to demographic trends, there are also potential competitive advantages to be gained through tangible effects on team performance." Poppy Lauretta McLeod, Sharon Alisa Lobel, Taylor H. Cox, Jr., *Ethnic Diversity and Creativity in Small Groups*, SMALL GROUP RESEARCH, Vol. 27, No. 2, May 1996, at 248, 260-261. Based on research involving a brainstorming task in which participants were separated into an ethnically diverse group (black, Asian, Hispanic, white) and an all-anglo group and asked to develop ideas and engage in problem-solving).

[29] *Compelling Interest: Examining the Evidence of Racial Dynamics in Higher Education, A Report of the AERA Panel on Racial Dynamics in Colleges and Universities* (Mitchell Chang, *et al.*, eds., 1999).

interactions and better acceptance of racially mixed occupational settings among both African Americans and Whites.[30]

3. Promotes Tolerance

A diverse learning environment develops skills vital to student success as productive, effective citizens in a 21st century world.[31] On the occasion of the 45th anniversary of *Brown v. Board of Education*, Richard Riley, Secretary, U.S. Department of Education spoke of the significant impact of diversity in public schools.

> "Since *Brown* there has been a wealth of new evidence confirming the important role schools play in the healthy development of children. It is our schools that must reaffirm – both by lesson and by example – the moral correctness of equality. ... We need to focus on issues that go beyond basic challenges to equality and involve more complex questions of perception and trust, which go to the very heart of how we live, work and interact with each other."[32]

Research on the impact of diversity has found that it is better for school districts to take intentional steps to foster

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[30] W.T. Trent, *Why Desegregate? The Effect of School Desegregation on Adult Occupational Desegregation of African Americans, Whites and Hispanics*, 31(2) INT'L JOURNAL OF CONTEMPORARY SOCIOLOGY 273 (1994); and Janet W. Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in HANDBOOK ON RESEARCH ON MULTICULTURAL EDUCATION (James A. Banks, ed. 1995).

[31] As the district court noted in *Wessmann v. Boston Sch. Comm.*, 996 F.Supp. 120, 128 (D. Mass. 1998): "Public secondary schools are of singular importance in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." Petitioner's Brief, Appendix 26a.

[32] 45th Anniversary Speech, *supra*, n. 21.

exposure to children of all races, ethnicities and nationalities. These efforts send a strong message to children.

> "[T]he fact is that social learning occurs whether it is planned or not. Hence, an interracial school cannot choose to have no effect on intergroup relations. It can only choose whether the effect will be planned or unplanned. Even a *laissez-faire* policy concerning group relations conveys a message – the message that either school authorities see no serious problem with relations as they have developed or they do not feel that the nature of intergroup relations is a legitimate concern for an educational institution."[33]

Wade Smith wrote that "[t]olerance evolves, like culture or language. Our regard for others is rarely immutable; and it often depends as much on the milieu in which our attitudes develop, as on the particular outgroup in question."[34] In a 1997 study, Jennifer Hochschild took it a step further finding that, "[r]acial separatism is neither ... a viable option for most African Americans nor an attractive one for most whites. At best, it is unstable and personally constricting; at worst, it is a recipe for increased tension, hatred, and eventual violence."[35]

Distilled to its essence, schools teach students the life interaction skills they need to succeed. Districts, by adopting

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[33] Janet Ward Schofield and H. Andrew Sagar, *Desegregation, School Practices and Student Race Relations*, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 59 (Christine H. Rossell et al. eds., Temple University Press,1983); *see also* Amy S. Wellans and Robert Crain, STEPPING OVER THE COLOR LINE: AFRICAN-AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS (1998).

[34] *Cohorts, Education, and the Evolution of Tolerance*, 14 SOCIAL SCIENCE RESEARCH 205, 205-225 (1985).

[35] Jennifer Hochschild, *Is School Desegregation Still a Viable Policy Option?*, POLITICAL SCIENCE & POLITICS (1997).

diversity policies, are providing youngsters with vital first-hand lessons in a protected, structured environment.[36]

CONCLUSION

Diversity in K-12 schools serves the purposes of promoting citizenship and harmony among people of different backgrounds and experiences, a notion that has been a continuing challenge since the Declaration of Independence – and without which the United States cannot continue to succeed as a democracy.[37] Promoting diversity as an educational benefit is in line with the historic mission of public schools and the ideals of Thomas Jefferson and Horace Mann. *E pluribus unum* – from many, one – this phrase has been a long-term goal of public education. Through their formative schooling years the many peoples of the United States come to learn that our commonalities outweigh our differences and that our destinies are all intertwined.[38]

Educators are hoping this Court will allow them the discretion to formulate an answer to this perplexing educational question. As the new century unfolds and the technological age speeds us along, the role of education will increase. The use of distance education will increase, but the most effective learning will still occur in face-to-face settings. As such, schools should be

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[36] *Brown*, 347 U.S. at 493 (Identifying education as "perhaps the most important function of state and local governments. It is required in the performance of our most basic public responsibilities. ... It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values...") .

[37] *Ambach v. Norwich*, 441 U.S. 68, 76 (1979)(Speaking of the "singular importance" of public elementary and secondary schools "in preparation of individuals as citizens and in the preservation of values on which our society rests").

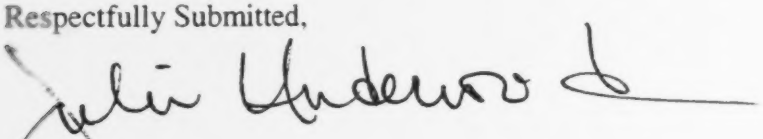
[38] *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. at 681 ("[one] of the objectives of public education is the inculcation of fundamental values necessary to the maintenance of a democratic political system.").

able to establish a learning environment which includes people of many different races, backgrounds, languages and ethnicities.[39]

Amici urge this Court to recognize again the special mission of K-12 education and the authority of local school officials to make decisions regarding academic programs that will prepare children for America's future. Many school districts around the nation have concluded that separate is academically deficient. A Supreme Court decision in this case is needed to affirm their authority to act on that conclusion. If this Court affirms that racial diversity is a constitutionally permissible, compelling educational interest, it would allow narrowly tailored plans, such as the one constructed by Montgomery County (Md.) Public Schools, to withstand challenge and thus achieve compelling its educational objectives.

Amici request that this Court grant *certiorari* to define the legal parameters in the use of race and student assignment, providing school districts clear guidance.

Respectfully Submitted,



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[39] "A priority objective of local, state, and federal education leaders and policymakers should be equal representation of African Americans, Latinos, and Native Americans among the most academically successful students, and policies should be evaluated against this goal." *Reaching the Top: A Report of the National Task Force on Minority Achievement*, p. 32, The College Board (1999).